

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

LAKEWOOD REFUSE SERVICE, INC.¹

Employer

and

Case 19-UC-660

TEAMSTERS LOCAL 313, affiliated with
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Union is a labor organization within the meaning of the Act.

The Employer is engaged in refuse collection in Lakewood, Washington. Petitioner represents a unit of approximately 14 truck drivers and regular helpers engaged in refuse pick up ("the Unit"). Petitioner seeks accretion of one transfer employee and one driver engaged in special pick ups. The Employer opposes accretion, taking the position that the classifications sought to be accreted were in existence prior to the current contract.

Petitioner has represented the unit for many years. The most recent contract has a term of May 1, 1998 to May 1, 2003. The contract covers truck drivers and non-driver helpers, and, by letter of understanding, a backhoe operator.

¹ The name of the Employer appears as corrected at hearing.

² The parties filed briefs which have been considered.

Historically, the truck drivers in the unit have been drivers holding a commercial driver's license (CDL) who drive refuse trucks on public highways, city streets, and private roads for the purpose of picking up refuse. Helpers are employees assigned to assist drivers on their routes. At the time of the hearing, no regular helpers were employed. About 11 truck drivers have regular refuse collection routes. They empty customer-filled garbage containers into refuse trucks; at the end of the routes, they return to the Employer's transfer station where they dump the garbage from the trucks into large containers in pits. One truck driver drives a roll-off truck; he picks up large customer-filled dumpsters, takes them to the transfer station, and dumps them. Two truck drivers, referred to in the record as "long haul drivers," haul full containers of refuse from the transfer station on the Employer's premises to a railhead. At times, they also move full containers from the pit to a place where they are tarped, and replace them with empties.

The truck drivers who have refuse collection routes are under the direct supervision of Charles Maxwell, the Employer's general manager. The truck drivers who haul containers to the railhead and the backhoe operator are under the direct supervision of Rory Foutz. The truck drivers start work at 5:30 a.m., and are expected to be at the first customer location at 6:00 a.m.; they work until they have finished their route for the day, normally at about 2:00 p.m. One driver who drives a front-load truck starts at 4:00 a.m. The drivers have specific route assignments. They each do one route per day, a different route each day of the week, and the same routes week by week. The long haul drivers travel from the Employer's transfer station to Tacoma; a round trip requires 40 minutes to an hour.

The backhoe operator, Randall Gardenhire, works in the transfer station. He operates a "track hoe," a machine which is larger than an ordinary backhoe and is used to compact the refuse in the containers, which are situated in pits. He operates a backhoe only on occasions when the larger track hoe is broken down; at those times, he uses the backhoe to compact refuse in containers.

The "transfer employee" sought in the petition is designated by the Employer as the "pit cleanup person," or "pit man." The incumbent is Gene Michaels. Michaels spends about two hours per day doing cleanup work, which apparently involves using a backhoe to pick up any garbage spilled in the dumping process. For this purpose, Michaels uses the same backhoe which is otherwise used at times by the unit backhoe operator, although Michaels doesn't use the machine to compact refuse in containers. The transfer station has two pits, and a container is placed in each pit. When a container is full, it is removed from the pit and a replacement container is pulled into the pit. Michaels regularly removes full containers from the pits and spots the empties. Michael performs the same container shuffling and tarping as described above in connection with the long haul drivers; he may use a conventional tractor or a "yard goat."

Michaels testified that his job has changed since he started working for the Employer in March 1999. When Michaels first started working, there was only one pit in operation and he performed no container hostling. Once the second pit opened, shortly after his hire, he began to be assigned to moving the containers. It appears that he has been given this assignment because the long haul drivers are usually absent from the premises, presumably even more so now that the second pit is open with presumably more containers on hand. Michaels testified that the primary responsibility of moving the containers rests with the long haul drivers if they are on the premises; if they are both absent, then the responsibility goes to Gardenhire, and if necessary falls upon Michaels or supervisor Foutz. On the average, 11 containers a day are moved out of the pit. Some days Michaels moves only one or two; other days he moves them all. A witness testified that the person who had the pit cleanup job prior to Michaels also moved and tarped containers, but "not to the extent that Gene is doing."

Michaels starts work at 6:00 a.m. and normally works until 3:30 p.m. He also comes in on weekends and does grounds maintenance for the sake of earning overtime. He is supervised by Foutz. Michaels does not have a CDL, or, indeed, any driver's license at all.

The driver engaged in special pickups is designated by the Employer as an "open truck driver." The incumbent is Ryan Torgerson. He has two areas of responsibility. The first is the delivery and retrieval of containers, commonly called dumpsters.³ He also goes out to repair broken dumpsters. On occasion, it is necessary for him to bring a dumpster into the Employer's shop for repair. If such a dumpster has refuse in it, he dumps it at the transfer station. Torgerson also responds to calls from refuse truck drivers for various types of assistance, such as helping to move a dumpster so it can be emptied.

Torgerson's second area of responsibility is performing clean up work for customers. Under the business name "AA Better Trash and Junk Cleanup" ("AA," herein), the Employer offers a clean-up service to the general public. The service encompasses removing junk and debris from yards, basements, sheds, and garages. Torgerson is the primary employee engaged in this activity. This service expanded at about the time Torgerson was hired about three months ago. At that time, the Employer began aggressively advertising the AA service in the local newspaper. The record does not establish whether open truck drivers employed prior to Torgerson also worked within customer premises, although there is evidence that at some time in the past, the Employer offered only a more limited service of making special pick ups of junk and debris which the customer was required to place in the driveway or otherwise at the street, i.e., the driver did not enter the customer's premises as Torgerson does now. Torgerson testified that his job has changed since his employment began in that he is busier since the Employer began advertising the AA service in the local newspaper.

There are specific examples of cleanup jobs Torgerson has done. On one occasion, an elderly man passed away, and AA was hired to clean out the basement, garage, and sheds on the property where the man had lived. On that job, Torgerson was assisted by Michaels. On another occasion, a party had been evicted from a residence, and AA was hired to clean out junk that had been left behind. On still another occasion, a woman hired AA to pick up an old garage door. After performing such jobs, Torgerson empties his truck at the Employer's transfer station. Torgerson's assignments for AA are usually given to him by John Giles, the office manager, or Theresa _____,⁴ a customer service representative, as they are persons who receive calls from customers.

Torgerson is directly supervised by Maxwell. He starts work at about 7:00 a.m. and works until his day's assignments are completed. He normally works 35 to 40 hours per week. He drives a "hook truck" on which different beds can be placed, including an open truck bed, a bed for transporting dumpsters, and a fork attachment used for front load containers. In contrast, unit truck drivers drive typical refuse collection trucks, and long haul drivers drive semi-tractors.

The record establishes that both the pit cleanup position and the open truck position have existed for many years. The pit cleanup position has historically been excluded. At some time in the past, prior to 1981, the open truck position was included in the bargaining unit.⁵ There is no evidence with respect

³ These are small one- or two-yard dumpsters, not the large 15- to 30-yard dumpsters handled by the roll-off driver.

⁴ Witnesses were unable to recall Theresa's last name.

⁵ A witness testified that he was the open truck driver for about seven years prior to 1981 and that he was a member of the bargaining unit during that time.

to the parties' treatment of the position in the intervening years, nor any explanation in the record as to how it came to be considered a non-unit position, but it did. There is no evidence that the open truck position was considered a unit position at any time after May 1982. There is no contention or evidence that either position at issue was discussed in the most recent contract negotiations.

In *Union Electric Company*, 217 NLRB 666 (1975), the Board said:

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category - excluded or included - that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

The Board follows a restrictive policy in finding accretions because the process of accretion does not afford the affected employees the opportunity to voice their preference for or against representation. *Compact Video Services*, 284 NLRB 117 (1987). The Board will find accretion appropriate only where the disputed employees display little or no separate group identity and have an overwhelming community of interest with the employees in the existing unit. *Safeway Stores*, 256 NLRB 918 (1981). However, even in those circumstances, the Board will not find an accretion where the employees at issue have historically been excluded from the recognized unit. Rather, the Board has long held that "where a group of employees has been excluded from a unit in which they could appropriately be included, they should not be placed in the established bargaining unit without first being extended the opportunity to vote as to whether or not they desire to be represented by the current bargaining agent of the established unit." *Zia Company*, 108 NLRB 1134 (1954); *Lufkin Foundry and Machine Company*, 174 NLRB 556 (1969); *Monongahela Power Company*, 198 NLRB 1183 (1972). However, if the pre-existing, excluded positions have been substantially changed during the current contract term, the placement issue can be revisited.

The question to be resolved here is whether the changes that have occurred recently in the disputed positions are so substantial that they outweigh the historic exclusion of the positions from the unit. Examples of such substantial changes can be found in *U.S. West Communications, Inc.*, 310 NLRB 854 (1993) and *Southwestern Bell Telephone Company*, 254 NLRB 541 (1981). In *U.S. West*, the work of a group of employees represented by the Order of Repeatermen and Toll Testboardmen had, through the evolution of technology, become indistinguishable from the work of employees represented by Communications Workers of America. Indeed, the two groups often worked side by side using the same equipment and performing similar tasks, to the extent that the Employer was required to take extra steps to determine the nature of the work before making assignments, and the presence of two separate groups led to an artificial division of the work. In *Southwestern Bell*, an Employer reorganization eliminated a separate engineering department. The (unrepresented) employees of the former engineering department were re-assigned to a larger entity, wherein they worked side by side with other (represented) employees and were indistinguishable from them.

Here, Petitioner contends that both positions have undergone substantial changes such that they are “virtually brand new positions.” With respect to the pit cleanup position, no duties or responsibilities have been added. The only change is that now the pit cleanup person moves filled containers out of the pits and moves empty containers into the pits more often than in the past. However, this is only a fraction of his overall duties. While these sorts of duties are performed by unit employees, the fact is that this non-unit position has always performed such duties, too. Thus, the pit cleanup person has not been assigned any new duties, but is merely performing a duty more often that has historically been part of his job, while continuing to perform all other duties which also have historically been part of the job.

With respect to the open truck driver, it appears that a new duty (i.e., entering a customer’s premises to clean out debris) has been assigned with regard to the AA cleanup service, but all this shows is that the employee moves the debris from inside the premises into the vehicles, rather than from truck-side into the vehicle. No unit employee performs similar duties, and the open truck driver continues to perform all other duties which have historically been part of his excluded job. Thus, while there are some new additional duties, they do not make the open truck driver more “unit-like.” In fact, the additional work seems highly manual, compared to the unit’s work, which is highly mechanized.

Petitioner argues that both disputed positions fall within the contractual unit inclusions of either “driver” or “helper.” In this vein, Petitioner urges that Michaels is a “driver” because he drives the vehicles used to move containers to and from the pits, or, in the alternative, he is a “helper” because he assists unit members with their work. In addition, Petitioner urges that Torgerson is a “driver” inasmuch as he drives a truck on public streets, or that he is a “helper” because he sometimes retrieves dumpsters that are full of garbage, and he responds to calls to assist drivers on their routes. But even if Michaels and Torgerson can be called “drivers” or “helpers,” the fact remains that their jobs have historically been excluded from the unit, and the duties relied on by Petitioner in support of its argument are not newly assigned duties not previously performed by the incumbents in those jobs. The issue is not whether they “should have been” in the unit, or would be placed in the unit if this were a contested, original organizing situation. The issue is whether these classifications, which for whatever reason have been excluded, have changed so substantially that they now are something “new,” and much “closer” to a unit position than to the pre-change position. Clearly, for all of the reasons given, and based on the entire record, such is not the case.

Therefore, I conclude that neither the pit cleanup position nor the open truck driver is an accretion to the existing unit, and I shall dismiss the petition.⁶

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive

⁶ On brief, Petitioner argues for accretion as a better alternative than the two-person bargaining unit that it suggests would result from a representation petition. However, a representation petition filed by Petitioner seeking the two positions at issue herein would not necessarily result in a separate two-person unit; the Board has held that an incumbent wishing to represent employees residual to those in its existing unit must do so by adding them to the existing unit by means of a self-determination election, rather than in a separate unit. *Budd Company*, 154 NLRB 421 (1965); *St. John’s Hospital*, 307 NLRB 767 (1992).

Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by July 15, 1999.

DATED at Seattle, Washington, this 1st day of July, 1999.

/s/ PAUL EGGERT

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